BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Irby Shepherd, dated February 1, 2000 alleging discrimination in employment on the basis of handicap.

B E T W E E N:

Ontario Human Rights Commission

- and -

Irby Shepherd

Complainant

- and -

Ontario Corporation 1110494 o/a Deluxe Toronto Limited, Film House
John Mordey

Respondents

DECISION

Adjudicator : Patricia E. DeGuire

Date : August 21, 2000

Board File No: BI-0332-00

Decision No : 00-013

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Naomi Overend Kiki Malik
Irby Shepherd *Complainant*	)	Jacquie Chic
Ontario Corporation 1110494 o/a Deluxe Toronto Limited, Film House John Mordey *Respondents*	)	Kirsten Watson

INTRODUCTION

This complaint before the Board of Inquiry ("Board") is about discrimination in employment contrary to s. 5 (1) of the *Human Rights Code* R.S.O. 1990, c. H.19, as amended ("*Code*"). The Complainant, Irby Shepherd, says while he was working for the Corporate Respondent, the Film House (now Deluxe Toronto Limited, Ontario Corporation # 1110494), he was subjected to discriminatory treatment because of handicap.

ISSUE

Does the Board lose jurisdiction to hear a complaint if after the hearing has begun, the Commission informs the Board that there was a procedural defect in its s. 36 decision?

DECISION

Once the Commission submits a case to the Board, it is deemed referred. From then, the Board has jurisdiction of the subject-matter of a complaint and must hold a hearing. Once the case has been referred, there is nothing in the *Code,* which restricts the Board's statutory obligation to hold a hearing into the complaint. The discovery of a procedural defect in the Commission's s. 36 decision does not nullify a referral. Only the Divisional Court can determine the legality of a referral.

BACKGROUND

On April 11, 2000, the Commission referred the subject-matter of this case to the Board. According to clause 39(1)(c) of the *Code*, and the Board *Rules of Practice*, the Board commenced the hearing, by telephonic conference call, on May 2, 2000. By the agreement of all the parties, the Board set a schedule for filing pleadings, providing disclosure of documents and mediation.

On June 2, 2000, the Commission and the Complainant filed and served their pleadings. On June 23, 2000, the Board received a letter from the Commission's counsel. The letter states that

the Commission had referred this complaint to the Board by letter dated April 11, 2000. It concedes that the Board had commenced the hearing into this matter on May 2, 2000. Further, it states that the Commission had just become aware that the Respondents' submissions, in response to the Case Analysis, had been omitted from its s. 36 decision to refer the matter to the Board. The Commission says it had notified all the parties of its error. Also, it advised them that the referral of the case to the Board is a nullity. In addition, the Commission told the parties that it would do a new s. 36 decision to correct the procedural error.

On June 28, 2000, the Board's Registrar wrote to the parties and requested written submissions in response to the Commission's June 23, 2000, letter. The Commission's and Respondents' counsel were to file a response with the Board and provide copies to all parties by June 30, 2000. The Board scheduled a telephonic conference call for July 12, 2000. The submissions of the parties in writing and at the conference call follow below.

THE PARTIES SUBMISSIONS

The Commission's counsel acknowledges that the Respondents' submissions were not included in the package the Commissioners considered in the section 36 decision. Counsel says this constitutes a beach of the Commission's duty of fairness. Commission's counsel argues stridently that it "takes the position" that the referral is a nullity because of the procedural defect. The corollary is, counsel argues, the Board has no jurisdiction over the complaint. Therefore, counsel says, the Commissioners' referral of the subject-matter to the Board is invalid and is of no legal effect. Further, she argues that the Board can not nullify the Commissioners' referral.

The Complainant's representative submits that the Complainant has a particular interest because of the long delay. She would like the procedural error to be resolved as soon as possible. She agrees with the Commission's position that the referral is invalid. She submits that s. 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (*SPPA*), gives the Board the authority to terminate its process. She argues that jurisdiction is not a necessary condition for the Board to invoke s. 23 of the *SPPA*. It is "the impropriety of the referral" the Board would be addressing when exercising its authority under s. 23 of the *SPPA*, not deciding if the referral is

void. She agrees that if the Board were to do the latter, it would be usurping the jurisdiction of the Divisional Court. However, she concurs in the submissions of the Commission's and Respondents' counsel that terminating the Board's proceeding and closing the file is the best course of action.

The Respondents' counsel submits that the complaint is rather old - since 1993. The age of the complaint makes it an urgent issue that ought to be resolved quickly. She says, to require the Respondents to attend the Divisional Court to review the Commission's error is problematic. Further, she argues, to proceed with a hearing in this matter would be an abuse of the Board's process. Moreover, she argues, the Divisional Court would render the Board's process void. She argues, that the Board should take jurisdiction where it can to ensure the Respondents and the Complainant are treated fairly. She submits there is jurisdiction under s. 23 of the *SPPA* for the Board to act to avoid abuse of its process. Thus, the Board should invoke s. 23 of the *SPPA*. She concedes that to invoke that section, the Board must have jurisdiction over the subject-matter. She does not oppose the resolution the Commission proffers.

The Commission's counsel proposes, as a resolution, that the Board follows its decision in *Mitges v. Imperial Oil Limited et al* (Ont. Board. Inq., unreported, March 3, 2000, (MacNaughton)). That is, terminate the Board's proceeding and close the Board's file. She says the Respondents' package would be submitted to the Commissioners. Then, they will do a new consideration under s. 36 of the *Code*. That, she submits, would cure the procedural defect.

FINDINGS

I have considered all of the submissions made by the parties and the authorities explored. The Commission concedes that, indeed, there was a referral. I accept the Commission's assertion that it had missed an important step in its s. 36 decision. However, I do not accept the Commission's arguments that the error renders the referral null and therefore, the Board lacks jurisdiction.

The Commission's discovery of an error in its procedure is not in itself a nullity. Simply because the Commission says that its error is a nullity does not make it so. A nullity is a judicial determination. Such determination is the sole prerogative of a supervisory court in Ontario. No supervisory court in Ontario has rendered this referral null and void.

The Commission's characterisation of its defect as a nullity does not operate to nullify the Board's jurisdiction. As the Court of Appeal enunciates in *McKenzie Forest Products Inc. v. Tilberg and Ontario Human Rights Commission* (2000), 48 O.R. (3d) 150 (C.A.)), "[o]nce a complaint has been referred to the Board of Inquiry, *there is no provision in the Code which limits the Board of Inquiry's obligation to conduct a hearing into a complaint."* (McMurtry, C.J.O. at para. 41 - emphasis added). Although that finding was with respect to the jurisdiction of the Board when the Commission decided not to participate further in the proceeding, it is of general application and apropos in this case.

It is trite that the Board has no jurisdiction to review the Commission's procedural defect. The obligation the supervisory courts in Ontario have placed on the Commission to make full and complete disclosure, and to permit the parties to make submission before its s. 36 analysis, is enforceable only by the courts in Ontario. If the Board questions the legality of a referral to it, even if there are defects in the Commission processes, in my view, is tantamount to judicially reviewing the Commission's processes.

I accept the Commission's argument that the Board can not nullify a referral from the Commissioners. To do so would require the Board to review the legal validity of a referral. It seems that even where there is persuasive evidence that a serious error occurred in the Commission's processes, the Board can not refer the matter back to the Commission. In my view, terminating this case, closing the file and sending it back to the Commission is nullifying the Commissioners' referral. Further, there is no express or implicit authority in the *Code,* which allows the Board to refer the subject-matter back to Commission.

Under the 1981 *Code*, if the Commission recommended to the Minister that a board should be appointed, the Minister must appoint a board: (ss. 37.(1) S.O. 1981, c.53). Also, before the Board became a standing tribunal in 1995, the Commission had the discretion to request the Minister to appoint a new board if the Board of Inquiry, for any reason, was unable to hold a hearing or make a finding or order: (ss. 40.(5)): repealed by the *Statute Law Amendment Act,* S.O. 1994, c.27 s. 65 (21). Under the 1995 *Code*, the Minister's appointment power ended. It was replaced by the conferral of exclusive power, on the Commission, to decide whether to refer a case to the Board. However, under the new scheme, the *Code* did not confer power on the Commission to appoint a new board, if for any reason, the Board of Inquiry was unable to hold a hearing or make a finding or order. Nor did the *Code* confer power on the Commission to reconsider its own referral to the Board. In my view, the Commission lacks power to reconsider or nullify its own referral. To do so would require clear statutory language. Further, the Commission can not arrogate to itself the power to reconsider a referral to the Board.

Regardless of the reason, the Commission can not withdraw the complaint from the Board. When the Commission declares that the referral is a nullity, essentially, it is withdrawing the complaint from the Board. In a previous matter, the Commission concedes that it lacks the authority to withdraw a complaint, which has been referred for a hearing: (*Tilberg v. McKenzie Forest Products Inc.* (1998), 33 C.H.R.R. D/258 (Ont. Bd. Inq.) para. 19).

Notably, none of the parties opposes the corrective measure proffered by the Commission. On its face, the Commission's solution seems pragmatic. The rationales are plausible. Notwithstanding, there are concerns about that proposal. Because a solution seems practical and plausible, and the parties agree to it, does not confer jurisdiction on the Board to grant that solution. The Board's

enabling statute defines its powers. Significantly, subsection 39.(1) of the *Code* confers authority on the Board to hold a hearing on the merits of the complaint. It states:

> The board of inquiry shall hold a hearing,
>
> (a) to determine whether a right of the complainant under this Act has been infringed;
>
> (b) to determine who infringed the right; and
>
> (c) to decide upon an appropriate order under section 41,
>
> and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board.

Essentially, the Board must hold a hearing once the Commission refers a case to it. As noted above, the Commission duly referred this complaint to Board, which the Board received on April 11, 2000. According to its statutory mandate, the Board commenced the hearing May 2, 2000. All the parties attorned to the Board's jurisdiction. The Board received the Commission's letter concerning the inadvertence in its s. 36 decision on June 23, 2000. That was well after the Commission and the Complainant had filed and served their pleadings. I find that the Board became seized of the complaint as at April 11, 2000. If the Board terminates its proceeding and closes the file in this case, that would be abrogating its statutory duty to hold a hearing. It is important to note that once the Commission refers the complaint to the Board, its role changes fundamentally. The Commission becomes a mere party to the proceedings, albeit with carriage of the complaint. After referral, it has no express or implicit statutory authority to reconsider its referral or to make any determination about a complaint.

In addition, there are fundamental differences, which markedly distinguish this case from *Mitges, supra.* First, in *Mitges,* the Commission had notified the Board of the procedural error before the hearing began. Second, an adjudicator had not been seized with the complaint. Third, the parties had not attorned to the Board's jurisdiction. Fourth, the Commission and the Complainant had not filed and served their pleadings. In this case, all those steps had taken place when the

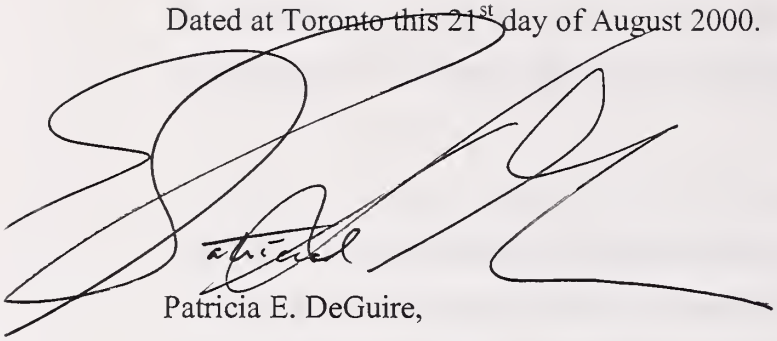
Commission informed the Board of its error. Also, the requisite thirty-day period had expired. I find the decision in *Mitges* case, the solution proffered by the Commission, inappropriate for this complaint. To follow the decision in *Mitges* case, would require the Board to relinquish its jurisdiction. The Board has no express or implicit jurisdiction under the *Code* to relinquish its jurisdiction.

Finally, the *Code* requires that the Board hold a hearing for three defined purposes. The *Code* does not define the term hearing. *Black's Law Dictionary,* 5th *ed.* defines the term as follows: "Proceeding...with definite issues of fact or of law to be tried, in which witnesses are heard and parties proceeded against have a right to be heard, and is much the same as a trial and may terminate in final order." In my view, a hearing before the Board can employ any of the resolutions, temporary or permanent, as in a trial, if it is not precluded, expressly or by necessary implication, by law. The resolutions include adjournment, dismissal, nullity, order and stay or stay of proceedings. Termination is not a recognised resolution in the trial process.

Without exploring the legal impact of each one, I find that a temporary stay of proceedings is the most appropriate resolution in this matter. A stay of proceedings does not negate the Board's statutory mandate to hold a hearing. This step is a temporary suspension of the regular proceedings. It is usually granted to await the action of one of the parties concerning an omitted step or act required to be performed, which is incidental to the case: (see *Black's*). It is procedural only and does not affect the substantive aspect of the case. It does not force the parties to seek judicial review of the Commission's action. The Board does not have to examine the Commission actions. Finally and notably, it does not attract the sanctions of *res judicata.*

Therefore, I hereby grant a temporary stay of proceedings so that the Respondents may seek judicial review of the Commission's defect. If the parties decide not to seek judicial determination, they are directed to communicate with the Registrar within thirty (30) days of this decision to set dates for the continuation of this matter.

Dated at Toronto this 21st day of August 2000.



Patricia E. DeGuire,

Vice-Chair, Board of Inquiry